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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARTHUR PIELET, JAMES PIELET, and ROBERT PIELET, Individually and as Trustees of the PIELET BROS. Employees' Profit-Sharing Plan and JOLIET RAILWAY Employees' Profit-Sharing Plan, and PIELET BROS. SCRAP IRON & METAL, INC., and JOLIET RAILWAY EQUIPMENT CO.,

Petitioners,

VS.

SEYMOUR PIELET, IRVING PIELET, and SAMUEL PIELET,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals improperly sanctioned the trial court's departure from the accepted and usual course of judicial proceedings by investing the jury with judicial power to resolve fact and law and to dispose of three totally diverse claims by its answer to one special interrogatory related to one claim only; and by such appellate sanction denied petitioners their constitutional rights to a trial by jury and due process on two claims asserted by them.

2. Whether the federal Employees Retirement Income Security Act (29 U.S.C.S. Sections 1104(a) and 1106(b)(2) prohibits a majority of trustees of a profit-sharing trust from amending trust agreements to invest the same majority trustees with preferred rights to compete with the funding employer company free of binding benefit forfeiture under the trust agreement, rights preferred and reserved to these trustees alone and rights the exercise of which would discriminate against the benefit interests of the remaining employee beneficiaries.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The petitioners here were the defendant-counterplaintiffs below; they are: Arthur Pielet, James Pielet, and Robert Pielet, individually and as Trustees of the Pielet Bros. Employees' Profit-Sharing Plan and Joliet Railway Employees' Profit-Sharing Plan, Pielet Bros. Scrap Iron & Metal, Inc. and Joliet Railway Equipment Co.

The respondents here were the plaintiff-counterdefendants below; they are: Seymour Pielet, Samuel Pielet, and Irving Pielet.

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II.

The Federal Employees Retirement Income Security Act (29 U.S.C.S. Sections 1104(a) And 1106(b)(2) Prohibits A Majority Of Trustees Of A Profit-Sharing Trust From Amending Trust Agreements To Invest The Same Majority Trustees With Preferred Rights To Compete With The Funding Employer Company Free Of Binding Benefit Forfeiture Under The Trust Agreement, Rights Preferred And Reserved To These Trustees Alone And Rights The Exercise Of Which Would Discriminate Against The Benefit Interests Of The Remaining Employee Beneficiaries 14

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In The

Supreme Court of the United States

October Term, 1982

ARTHUR PIELET, JAMES PIELET, and ROBERT PIELET, Individually and as Trustees of the PIELET BROS. Employees' Profit-Sharing Plan and JOLIET RAILWAY Employees' Profit-Sharing Plan, and PIELET BROS. SCRAP IRON & METAL, INC., and JOLIET RAILWAY EQUIPMENT CO.,

Petitioners,

vs.

SEYMOUR PIELET, IRVING PIELET, and SAMUEL PIELET,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The Seventh Circuit Court of Appeals held that the trial court properly bifurcated each of three diverse principal claims upon one special interrogatory and properly accepted the jury's response as completely dispositive of each of said claims.

The court failed to consider whether Sections 1104(a) and 1106(b)(2) of the Employees Retirement Income Security Act of the United States prohibited majority trustees of an employees' profit-sharing trust from amending the trust agreement to invest themselves with the right to compete with the funding employer company free of benefit forfeiture otherwise applicable to them and the remaining employee-beneficiaries under the binding terms of the trust agreement. (A copy of the opinion is attached as Appendix A.)

JURISDICTION

The Court of Appeals' decision was rendered on August 12, 1982. A Petition for Rehearing was denied September 8, 1982. This petition is being filed within ninety days of the date the Court of Appeals denied the Petition for Rehearing as per 28 U.S.C.S., Sec. 2102(c). This Court's jurisdiction is invoked under 28 U.S.C.S., Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendments V, VII, and XIV of the Constitution of the United States and federal Employees Retirement Income Security Act, 29 U.S.C.S., Sections 1104(a) and 1106(b)(2).

STATEMENT OF THE CASE

The case proceeded to trial on April 20, 1981 upon respondents' claim to profit-sharing benefits based upon existing written profit-sharing agreement authored by said respondents as a majority of the plan trustees. The cause also proceeded to trial upon petitioners' claims to damages and injunctive relief. Petitioners' claims were based upon violations of a written employment contract which forbade respondents' competition and upon tort principles which forbade their unfair competition.

Evidence was taken on each of the claims. The uncontested facts were:

1. The respondents competed with the host companies for many years.

2. The respondents in competing with the funding companies pirated ten key employees of Pielet Bros.; twenty-five substantial customers, and virtually the identical name—Pielet Bros. Trading, Inc.

3. The employee profit-sharing agreements provided for benefit forfeiture where beneficiaries competed with the funding company in the same line of business.

4. The respondents were three of five plan trustees who devised and adopted the plan agreements in 1967 and 1969.

5. The respondents were three of five plan trustees who on March 22, 1975, as the trial court and jury found, amended the plan agreements by the employment agreements of the same date to give each of the three trustees the right to compete with this company free of benefit forfeiture otherwise applicable to them and the remaining hundreds of employees.

At the close of respondents' evidence and, again, at the close of all evidence, petitioners moved for directed find-

ings on each of their two claims and against respondents on their claim to profit-sharing benefits.

Petitioners' Motion for Judgment Non Obstante Veredicto Or For A New Trial was also denied.

Petitioners were denied their motions as counterplaintiffs and defendants for directed findings at the close of all evidence and earlier at the close of the evidence of petitioners and respondents on issues involving:

1) forbidden competition forbidden to respondents by the employment agreements of March 22, 1975; and

2) unfair competition with Pielet Bros. forbidden to respondents by principles of tort; and

3) profit-sharing benefits forfeited to respondents for their competition with the host employer.

On April 28, 1981, the jury returned its verdict. It answered "no" to the following single, special interrogatory:

> "In using the language 'employee shall not own, operate, or participate in the ownership or operation of a scrap yard or shredder,' in paragraph 7 of the employment agreements, did the parties intend to prohibit Seymour, Samuel, and Irving Pielet from buying and selling scrap metal within 100 miles of the City of Chicago?"

Petitioners renewed their written motions for favorable judgments when the court entered judgment for the respondents on the jury's verdict.

In 1967 and 1969, Pielet Bros.* and Joliet Railway* adopted and executed two trust agreements to govern the

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* Each a petitioner:

Pielet Bros. Scrap Iron & Metal, Inc. is abbreviated to Pielet Bros.

Joliet Railway Equipment Co. is abbreviated to Joliet Railway.

profit-sharing rights and benefits of their employees, including each of the three respondents who were then majority stock owners of Pielet Bros. and Joliet Railway and also majority trustees of the trust fund and trust agreement.

The plan agreements were organized and drafted under the supervision of attorney Herbert Olfson, an attorney selected by the three respondents as "majority trustees" and signed by each as trustee. Later amendments, some six in number, each designated "Amendment" were separately signed by each of the respondents as trustee and separately prepared under the supervision of attorney, Herbert Olfson.

On March 22, 1975, the same three respondents, still the majority company owners and the majority trustees of the profit-sharing fund and trust agreement, executed two year employment agreements with Pielet Bros. and Joliet Railway. The court and jury found these agreements to have amended the profit-sharing agreements to confer rights of competition upon the respondents free of benefit forfeiture mandated by the plan agreements.

The profit-sharing agreements, without exceptions, exclusions, or difference, provided that an employee would be subject to discharge for cause "for actively engaging in or working for a business in direct competition with an employer while employed by an employer * * *," and, further, that for such competition, "shall not be entitled to any portion of the amount of his account attributable to Employer Contributions."

Each plan also provided that:

> "No person shall have any interest in any claim upon the fund or any part thereof except as expressly provided in the Plan * * *." (Sec. 13.01 and 15.01.)

Shortly after March 22, 1976, after selling out to their brother, Arthur Pielet and while engaged as employees of Pielet Bros. and Joliet Railway, respondents competed with Pielet Bros. and Joliet Railway by buying and selling scrap metal and operating from principal business offices in greater metropolitan Chicago. This fact of competition is admitted.

For this competition, respondents were discharged.

On June 30, 1976 Seymour, Samuel, and Irving Pielet were notified in writing of their discharges and of their removal as profit-sharing trustees for engaging in competition with Pielet Bros. Additional reasons were given; they included charges of unfair competition, raids upon key employees, and misappropriation of Pielet's business name, all taking place immediately after March 22, 1975 when Seymour, Samuel, and Irving Pielet, for more than twenty-five years majority stock owners of Pielet Bros. and Joliet Railway, sold out to Arthur Pielet.

Shortly before the March 22, 1975 sale, Seymour, Samuel, and Irving, and Arthur considered adding a new business site to the Pielet business, the site to be located in southern Illinois. The additional site was to be acquired for the purpose of utilizing some unused, valuable automobile shredding and other machinery and equipment.

Seymour, Samuel, and Irving Pielet explored, located, and acquired for themselves the southern Illinois site at National City on March 25, 1975, one business day after the Pielet-Joliet sale of March 22, 1975. Arthur Pielet was never notified of the site selection or its purchase by Seymour, Samuel, and Irving. On the same March 25, 1975, they also acquired a full range of business, building and zoning permits, all acquired without municipal hearings or municipal or other government sanctions.

The National Stockyards of National City, Illinois, a private party, issued the business, building, and zoning permits.

It was only a few days before their National City acquisition of March 25, 1975 that the respondents initiated buy-out negotiations with Arthur Pielet. On Thursday, March 20, 1975, "at the telephone request of Seymour Pielet, Arthur Pielet met with Seymour, Samuel, and Irving Pielet at the Argo-Summit" plant.

Meanwhile, on March 20, 1975, Irving Pielet telephoned attorney Herbert Olfson to come out and "discuss the transaction." Olfson testified he knew "instantly that he was going to represent him [Irving] and not his brother, Arthur." He said that he "decided in my own mind that I was representing Irving; as I was representing Irving, Seymour, and Samuel, I did not believe that I could also represent Arthur." He testified that "he hopped to it." He went right out there that afternoon to discuss a transaction in which Arthur Pielet was going to purchase the stock interests of the other three brothers. Olfson had for many years before represented the entire Pielet family and the Pielet corporations, including brothers Arthur and Philip, who had died in 1974.

Soon after the Olfson arrival during the afternoon of March 20, 1975, Olfson told Arthur to "get yourself somebody else to represent you"; that he was "representing Irving and the others." He "urged him to get another attorney." He added that Seymour Pielet then said "we haven't got the time to get another attorney for him [Arthur]."

Olfson further testified that he did not tell Arthur that since a $10,000,000 deal was involved that he "was not going ahead with it until you [Arthur] get somebody to

represent you." Olfson failed to inform Arthur of the risks or dangers he faced in a large stock transaction of this size and kind.

Olfson and Blust proceeded with the negotiations and prepared the "necessary papers to effectuate the earlier oral agreement." They never prepared a written agreement or any writing or writings to reflect the terms of the sale; nothing to express either the buyer's obligation to buy or the sellers' obligation to sell; nothing of warranties or representations respecting stock ownership or of liens or liabilities, and nothing of pending or threatened litigation, taxes, indemnification, guarantees, etc. They did prepare three written employment agreements with Pielet Bros., one for each of the respondents. Each was provided with almost two years of employment at an average annual salary of $100,000 and two additional years of profit-sharing valued at approximately $200,000. They drafted a six month option agreement that required Arthur Pielet to deliver itemized auto shredder parts and other machinery and equipment to the newly acquired National City plant of the respondents and an agreement that cancelled the Pielet Bros. buy-sell stock agreement enabling Seymour, Sam, and Irving to add $750,000 to the purchase price.

Each of the March, 1975 employment agreements contained "no-compete provisions" which provided:

* * *

> "7. *Restrictive Covenants.* Both parties recognize that the services to be rendered under this Agreement and the knowledge now possessed and to be acquired hereunder by Employee are special, unique, and of extraordinary character. Employer (sic) shall not, for a period of five years subsequent to the date of this Agreement, directly or indirectly, alone, or as

a member of a partnership or as an officer, director, stockholder or investor of or in any other corporation or enterprise (except as an investor in a publicly held corporation listed on a national securities exchange), or otherwise, own, operate, or participate in the ownership or operation of a scrap yard or shredder within Chicago, Illinois or 100 miles of the city limits of Chicago, Illinois, excluding the cities of Milwaukee, Wisconsin and Sterling, Illinois. During such period, Employee shall not communicate or divulge to any person, firm or corporation, either directly or indirectly, any business affairs of Employer, any experience gained by him in the Employer's employ, the names of any of Employer's customers, or any other information not generally available to the public relating to Employer's business affairs or products.

* * *

"9. *Remedy for Breach.* In the event of the breach by Employee of any of the terms and conditions of this Agreement to be performed by him (including, but not limited to, leaving Employer's employment or performing services for any person, firm or corporation engaged in a competing similar line of business with Employer without the written consent of Employer) Employer shall be entitled, if it so elects, to institute and prosecute proceedings in any court of competent jurisdiction, either at law or in equity, to obtain damages for any breach of this Agreement, and to enjoin him from performing services for any such other person, firm, or corporation in violation of the terms of this Agreement. The remedies provided herein shall be cumulative and in addition to any and all other remedies which Employer may have at law or in equity."

Olfson testified that the parties did not intend paragraph 7 of the employment agreements to amend the profit-sharing agreements. He testified:

Q: I asked you sir, whether or not paragraph 7 was designed by you to amend the profit-sharing plan. Was it?

A: No, it was not.

Several weeks later in mid-May, 1975, the respondents adopted the corporation name of "Pielet Bros. Trading, Inc.," opened its principal offices at DesPlaines, Illinois within Metropolitan Chicago, proceeded to take ten former key employees and twenty-five customers of Pielet Bros., and bought and sold scrap metal in Metropolitan Chicago under the name of Pielet Bros. Trading, Inc. in competition with Pielet Bros.

On June 30, 1976, as indicated, Arthur Pielet, James Pielet, and Robert Pielet, as owners of Pielet Bros., discharged the respondents and, as trustees of the profit-sharing plans, disqualified them from receiving profit-sharing benefits under the several plan agreements.

Respondents sued to recover their profit shares. Petitioners defended against the profit-sharing claims on the grounds of competitive forfeiture and countersued to recover damages, actual and punitive, for respondents' competition forbidden by the March, 1975 employment agreements and for respondents' unfair competition forbidden by common law principles of tort.

The jury and the District Court, on a single interrogatory, construed the restrictive covenant of the March, 1975 employment agreements to permit respondents to compete and extended such construed right to compete to cancel out both the forfeiture provisions of the profit-sharing agreements and the unfair competition counterclaim of the petitioners.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE COURT OF APPEALS IMPROPERLY SANCTIONED THE TRIAL COURT'S DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY INVESTING THE JURY WITH JUDICIAL POWER TO DISPOSE AND RESOLVE ALL FACTS AND LAW AND TO DISPOSE OF THREE TOTALLY DIVERSE CLAIMS BY ITS ANSWER TO ONE SPECIAL INTERROGATORY THAT RELATED TO ONE CLAIM ONLY; AND BY SUCH APPELLATE APPROVAL, DENIED THE PETITIONERS THEIR CONSTITUTIONAL RIGHTS TO A TRIAL BY JURY AND TO DUE PROCESS ON TWO CLAIMS ASSERTED BY THEM.

The issues here are new; the judicial acts of the trial and appellate courts appear to have entered upon maiden judicial territory. The questions of law are of enormous importance and should be settled by this case.

Do constitutional guarantees of due process and trial by jury and established judicial processes empower a court to delegate judicial power to a jury to dispose of all facts and law in three diverse claims upon a single finding of fact reached in one claim only, a claim wholly unrelated to those that remain?

This case involves three claims, one by the respondents and two by the petitioners. Each is separate, each is different, and none are linked by common operative facts or law. Each derives its judicial supporting viability from its own different and separate sources of fact and law.

There is simply no fusion, interdependence, or interrelatedness of these claims where:

1. respondents' claim is based upon two written profit-sharing agreements authored and signed by the respondents themselves as trustees in 1967 and 1969; petitioners defend upon the ground that the plan agreements forbid competition on pain of benefit forfeiture;

2. the petitioners base one claim upon contract and the other upon respondents' tortious conduct. Their contract claim rests upon the March, 1975 employment agreements. The charge is that respondents competed with Pielet Bros. and Joliet Railway in violation of the "no compete" provisions of each of such agreements. The requested relief is compensatory damages;

3. petitioners' second claim rests upon charges that respondents engaged in acts of unfair and dishonest competition with Pielet Bros. and Joliet Railway by unlawfully appropriating the trade name of "Pielet Bros." and raiding its major employees and customers. Punitive and compensatory damages are requested.

No single jury interrogatory nor its special answer is capable of singly and completely disposing of all three such disparate claims without doing violence in the process to constitutional guarantees of due process and trial by jury, to the rule forbidding surrender or abandonment of a client's claim without the client's express consent, and to clear, basic tenets of reason and justice.

The jury's "no" answer to the special interrogatory simply found as a fact that the March, 1975 employment contracts did not forbid respondents from competing with their employer, Pielet Bros., and that their admitted competition did not, therefore, violate such contracts. Petitioners' claim for damages based upon respondents' forbidden competition was, accordingly, resolved against them.

The special verdict on the other hand neither could nor did dispose of petitioners' claim for damages based upon charges that the respondents unfairly competed with Pielet Bros. by misappropriating its trade name and pirating its key employees and customers. The jury's finding of fact that the respondents were free to compete was not a finding that they were free to compete unfairly or dishonestly or fraudulently. Given the jury's finding to permit competition, it does not follow, as the trial court erroneously found, that the unfair use by the respondents of such right was automatically fair and just.

Although invested with wide discretion as to the form and substance of a special interrogatory, all material issues and all causes of action must be covered by the question or questions submitted; otherwise, as here, petitioners' constitutional rights to due process and jury trial would be and were violated (Fifth and Fourteenth Amendments, Constitution of the United States; Seventh Amendment, Constitution of the United States; 25 Wash. U. Law Quarterly, 183, abridged 3 F.R. Service 747.)

Petitioners have been denied jury consideration of record facts showing that the respondents had long before March 22, 1975 plotted to coerce Arthur Pielet into buying their corporate interests; that respondents pretended in January and February of 1975 to explore new southern Illinois business sites for the benefit of Pielet Bros. while secretly planning to acquire these business sites for themselves; that they acquired these sites and business licenses, building permits, and zoning authorizations from a private party on Tuesday, March 25, 1975, one business day after their sale to Arthur Pielet; that within days of receiving $10,000,000, they seized the name of "Pielet Bros.", raided its employees and misappropriated its customers.

Petitioners should have been allowed a jury trial of the issues of unfair competition. The jury's answer to the single interrogatory, judicially applied and adversely extended to dispose of all claims constituted a denial of petitioners' constitutional rights to due process and a jury trial.

The jury's answer to the single interrogatory, judicially applied and extended for the respondents to amend the profit-sharing agreement by eliminating the benefit forfeiture provision for the respondents, also constituted a denial of petitioners' constitutional rights to due process and a jury trial.

II.

THE FEDERAL EMPLOYEES RETIREMENT INCOME SECURITY ACT (29 U.S.C.S. SECTIONS 1104(a) AND 1106(b)(2) PROHIBITS A MAJORITY OF TRUSTEES OF A PROFIT-SHARING TRUST FROM AMENDING TRUST AGREEMENTS TO INVEST THE SAME MAJORITY TRUSTEES WITH PREFERRED RIGHTS TO COMPETE WITH THE FUNDING EMPLOYER COMPANY FREE OF BINDING BENEFIT FORFEITURE UNDER THE TRUST AGREEMENT, RIGHTS PREFERRED AND RESERVED TO THESE TRUSTEES ALONE AND RIGHTS, THE EXERCISE OF WHICH WOULD DISCRIMINATE AGAINST THE BENEFIT INTERESTS OF THE REMAINING EMPLOYEE BENEFICIARIES.

This issue, too, involves an important question of law which, to petitioners' knowledge, has not been, but should be, settled by this case. Case law appears to deal almost exclusively with plan fiduciaries' misconduct consisting of misappropriation or misuses, directly or indirectly, of the assets of profit-sharing trusts; none involve the misconduct of plan trustees who preferentially reserve to themselves, as in the case at bar, the right to freely

compete with the funding employer in the same line of business.

The jury's "no" answer to the special interrogatory was applied and extended to amend the profit-sharing agreements by specially eliminating their forfeiture provisions as to the respondents. Preferential rights were thereby created which were adverse to the interests of the plan and to the interests of the participants or beneficiaries. Moreover, such fiduciary conduct was not a discharge of duties with respect to the plan that could be considered solely in the interests of the participants and beneficiaries.

The relevant provisions of the Employees Retirement Security Income Act are Sections 1104(a) and 1106(b)(2). Section 1104(a) provides:

> "* * * a fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries * * *."

Section 1106(b)(2) provides:

> "Transactions between plan and fiduciary. A fiduciary with respect to a plan shall not—
>
> * * *
>
> "2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries * * *."

Where, as here, the jury's finding of respondents' right to compete is enlarged to amend the profit-sharing agreements by broadening such right to become free of benefit forfeiture as required by the profit-sharing agreements, such amendatory action shall fail as a preferred grant of valuable and protected rights to the plan trustees, as fiduciary rights not given to other plan bene-

ficiaries. Such grants of preferred rights and benefits squarely conflict with Section 1104(a) of the Federal Pension Reform Act which insist that plan fiduciaries discharge their duties "solely in the interests of the participants and beneficiaries."

Moreover, this amendatory action of the plan trustees discriminates against the remaining plan beneficiaries by investing such trustees with rights of competition that are reasonably certain to reduce company profits and correspondingly to reduce the company's plan contributions, lessening thereby the respective interests of each of the plan beneficiaries. Clearly, this amendatory action is contrary to Section 1106(b)(2) which forbids transactions with the plan which are "adverse to the plan or the interests of the participants or beneficiaries."

CONCLUSION

For the foregoing reasons, the petitioners pray that this Court grant their Petition for Writ of Certiorari and, upon review, reverse the Court of Appeals' decision, and remand with directions to enter judgment for the petitioners upon (i) respondents' Amended Complaint; (ii) petitioners' counterclaim for breach of the "no compete" provisions of the employment contracts of March 22, 1975; and to grant (iii) a new trial on issues of respondents' liability upon counterclaim charges of unfair competition.

Respectfully submitted,

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November 11, 1982

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 81-2117

SEYMOUR PIELET, IRVING PIELET, and SAMUEL PIELET,
Plaintiffs-Counterdefendants-Appellees,

v.

ARTHUR PIELET, JAMES PIELET, and ROBERT PIELET, Individually and as Trustees of the PIELET BROS. Employees' Profit-Sharing Plan and JOLIET RAILWAY Employees' Profit-Sharing Plan, and PIELET BROS. SCRAP IRON & METAL, INC., and JOLIET RAILWAY EQUIPMENT CO.,
Defendants-Counterplaintiffs-Appellants.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-C-4446—Bernard M. Decker, *Judge.*

ARGUED APRIL 1, 1982—DECIDED AUGUST 12, 1982

Before ESCHBACH, *Circuit Judge*, NICHOLS, *Associate Judge*,* and POSNER, *Circuit Judge.*

NICHOLS, *Associate Judge.* This case comes before the court on appeal from a judgment against appellants entered by the Honorable Bernard M. Decker, United

* The Honorable Philip Nichols, Jr., Associate Judge of the United States Court of Claims, is sitting by designation.

States District Court for the Northern District of Illinois, Eastern Division, on June 11, 1981.

In 1975, defendant, Arthur Pielet, bought all of the common stock of the family scrap metal business from his brothers, Seymour, Samuel, and Irving. Previously, all four brothers had owned the business in equal shares. The business had grown in a few years from small beginnings, and became highly successful. Plaintiffs-appellees sold their interests in the business to Arthur, receiving as consideration $10 million in cash and some $600,000 in used equipment. In addition, plaintiffs were to remain on the payroll of Pielet Bros. Scrap and of Joliet Railway Equipment Co., another family business, as part-time consultants through January 1, 1977, receiving, in addition to their salaries, the right to their interests in the companies' profit-sharing plans. One year later, Arthur claimed that his brothers, by virtue of various actions they had taken, forfeited all rights in the corporate profit-sharing funds.

The case was first brought in an Illinois State Court as an action where plaintiffs-appellees sought declaratory relief regarding their rights under the above-mentioned profit-sharing plans. On defendants' motion, the case was removed to the U.S. district court where defendants counterclaimed for damages and injunctive relief alleging violations of certain noncompetition agreements and acts of unfair competition. The noncompetition agreements were actually provisions of the employment contracts entered into as part of the 1975 buy-out.

Prior to trial, plaintiffs moved for partial summary judgment, seeking a declaratory judgment that they were permitted to deal in scrap in Chicago and that the forfeiture of their interest in the Pielet Bros. profit-sharing plan was illegal. Although plaintiffs-appellees' interests in both the Pielet Bros. Employees' Profit-Sharing Plan and the Joliet Railway Equipment Company Employees' Profit-Sharing Plan are the subject of this appeal, the latter plan, *i.e.*, the Joliet Railway Plan, was not in issue on plaintiffs' motion for partial summary judgment.

On February 3, 1978, the district court filed a memorandum opinion and order denying plaintiffs' motion for partial summary judgment on both the scrap-dealing and the forfeiture issues. In its opinion, the court concluded that section 7 of each of the employment agreements was meant to, and did in fact, govern the amount of competition that was to be permitted between the parties notwithstanding the existence of a non-compete provision in the Pielet Bros. profit-sharing plan.

Section 7 of the employment agreements provided:

> Both parties recognize that the services to be rendered under this Agreement and the knowledge now possessed and to be acquired hereunder by Employee are special, unique, and of extraordinary character. [Employee] shall not, for a period of five years subsequent to the date of this Agreement, directly or indirectly, alone, or as a member of a partnership or as an officer, director, stockholder or investor of or in any other corporation or enterprise (except as an investor in a publicly held corporation listed on a national securities exchange), or otherwise, own, operate or participate in the ownership or operation of a scrap yard or shredder within Chicago, Illinois or 100 miles of the city limits of Chicago, Illinois, excluding the cities of Milwaukee, Wisconsin and Sterling, Illinois. During such period, Employee shall not communicate or divulge to any person, firm or corporation, either directly or indirectly, any business affairs of Employer, any experience gained by him in the Employer's employ, the names of any of Employer's customers, or any other information not generally available to the public relating to Employer's business affairs or products.

The pertinent provisions of the Pielet Bros. profit-sharing plan relating to noncompetition were as follows:

> 8.01 Any participant who becomes a Terminated Employee shall be entitled to receive the entire amount of his account attributable to his Employee

Contributions, and, unless he has been discharged for "cause," as hereinafter defined, he shall be entitled to receive that portion (sometimes referred to herein as the "vested interest") of the amount of his account attributable to Employer Contributions as is shown by the following table:

If the Number of his Full Consecutive Plan Years of Participation Is:	The Portion of the Amount of his Account Balance Shall Be:
1	10%
2	20%
3	30%
4	40%
5	50%
6	60%
7	70%
8	80%
9	90%
10 or more	100%

* * * * *

8.02 Discharge for "cause" shall mean discharge for * *.* actively engaging in or working for a business in direct competition with an Employer while employed by an Employer. * * *

The equivalent provisions of the Joliet Railway Plan were:

8.01 Any Participant who becomes a Terminated Employee shall be entitled to receive the entire amount of his Account Balance attributable to his Employee Contributions, and, unless he commits or has committed a "prohibited act" (as hereinafter defined), he shall be entitled to receive that portion (sometimes referred to herein as the "vested interest") of his Account Balance attributable to Employer Contributions as is shown by the following table:

If the Number of his Full Consecutive Plan Years of Participation Is:	The Portion of the Amount of his Account Balance Shall be:
1	10%
2	20%
3	30%
4	40%
5	50%
6	60%
7	70%
8	80%
9	90%
10 or more	100%

* * * * *

10.04 For purposes of the Plan, a "prohibited act" shall mean any of the following: * * * (d) engaging in activity, while in the employ of an Employer, which competes with any activity of an Employer; * * *

The district court also concluded that section 7 was ambiguous and to clarify the ambiguity, it would be necessary to resolve disputed facts, which could not be done on a motion for summary judgment. This conclusion made trial necessary.

Subsequent to the denial of partial summary judgment, the case proceeded to trial on plaintiffs' claim for profit-sharing plan benefits and defendants' claims for breach of contract and unfair competition, before a jury on April 20, 1981. At the trial, there was a good deal of evidence about the actual negotiation of Arthur's purchase and the related employment agreements. There is no need to state this evidence in detail. At the least of it, the jury could have found that Arthur fully understood that by section 7 his brothers would compete with a scrap yard or shredder outside 100 miles of Chicago and buy and sell within that limit. At the close of plaintiffs' evidence, defendants moved for a directed verdict, which motion was denied. Similarly, cross-

motions for directed verdicts were denied at the close of all the evidence.

After extensive consultation with counsel for both sides, the district court submitted a single special interrogatory to the jury concerning the meaning of section 7 of the employment agreements. Both sides agreed to the procedure and upon the language of the special interrogatory which read:

> In using the language "employee shall not own, operate, or participate in the ownership or operation of a scrap yard or shredder," in paragraph 7 of the employment agreements, did the parties intend to prohibit Seymour, Samuel, and Irving Pielet from buying and selling scrap metal within 100 miles of the City of Chicago?

The judge plainly thought that an answer to this one question furnished the key to the entire case. The jury answered the interrogatory "no" and the court entered judgment for the plaintiffs and against Arthur and the other defendants. The court directed the parties to attempt to agree on the value of plaintiffs' profit-sharing plan interests prior to its entry of judgment. The parties did so agree, and these agreements were incorporated into a final judgment order dated June 11, 1981. Defendants then filed a motion for a judgment notwithstanding the verdict which was denied on July 1, 1981. Defendants filed their notice of appeal with this court on July 10, 1981.

Appellants advance three main grounds for this appeal. First, they contend that the forfeiture of appellees' interest in the profit-sharing plans should be governed by the terms of the plans alone and not the provisions of the subsequent employment agreements, specifically section 7 thereof. Secondly, they argue that the trial court erred in submitting the issue of the meaning of the words "scrap yard and shredder" to the jury when the meaning thereof was unambiguous and thus no question of fact remained for the jury to decide. Finally, appellants contend that the trial court erred in

entering judgment on their counterclaim for unfair competition when neither the special interrogatory nor the jury's answer thereto bore any relation to the issues involved in the unfair competition claim.

Appellees oppose the arguments made by appellants contending that the lower court's entry of judgment should be affirmed. They also advance additional grounds why their pension plan interests should not be forfeited. Appellees argue that the forfeitures were invalid under the Employees Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.* Further, that under each of the profit-sharing plans, forfeitures are not automatic and the procedures for forfeiture, were not followed, hence the forfeitures were legally ineffective.

Because we affirm the lower court's disposition of this case, we express no opinion on the effect of ERISA on the forfeiture of pension plan interests, either as a general matter, or as regards the pension plan interests in this case. Such issues are mooted. Similarly, we do not reach the question of whether under the plans forfeitures are automatic or whether proper procedures were followed.

I

Appellants assert that there is no evidence to support the trial court's conclusion that section 7 of the employment agreements governed the amount of competition allowed between the opposing parties under the profit-sharing plans in question. In fact, appellants contend that each plan provides its provisions alone shall govern the benefit rights of employee participants. Furthermore, plaintiffs' own attorney who drafted the employment agreements disowned an intention to amend the profit-sharing plans. Therefore, appellants argue, since plaintiffs have admitted to forms of competition that breach the controlling noncompetition provisions of the profit-sharing plans, the lower court erred when it refused to grant their motions for a directed verdict and

a judgment, notwithstanding the verdict in their favor. We disagree.

Initially, the profit-sharing plans were drafted in 1967, the employment agreements in 1975. Paragraph 5(a) of each of the 1975 employment agreements provides in pertinent part:

> During the term of this Agreement, Employee shall be considered an employee *eligible to participate under Employer's profit sharing plan* and shall be entitled to any other regular fringe benefits provided for employees of Employer during such period. * * * [Emphasis supplied.]

The terms of the employment agreements explicitly contemplate that Seymour, Samuel, and Irving would continue to be eligible to participate in the profit-sharing plans. Appellees were at the time of the 1975 agreements, 80 percent and 75 percent vested in the Pielet and Joliet Railway plans, respectively. It appears to us that section 7 was specifically tailored to meet the needs of the two sides. Arthur, on the one hand, needed some protection against competition by his brothers because part of the 1975 buy-out was that they would get the shredder equipment. The appellees, on the other hand, did not want to abandon the scrap business entirely. They also wanted to retain their interests in the profit-sharing plans.

As touched on earlier in this opinion, Arthur had agreed to an option for the sale of $600,000 worth of shredder equipment and to a further agreement whereby the company established by his brothers, on one hand, and Pielet Bros., on the other, would loan spare parts to each other for a period of 10 years. As the trial court apparently recognized, the option and parts loan agreements and the right of Seymour, Samuel, and Irving to operate a shredder without losing their eligibility for pension benefits, are rendered meaningless if the restriction on competition found in the profit-sharing plans is not modified or explained by section 7. Merely doing what the employment agreements permit, *i.e.*, owning or operating a "scrap yard

or shredder" 100 miles outside Chicago city limits would thus allow a forfeiture of appellees' profit-sharing benefits, a result that was not intended by the parties. Indeed a written modification of the employment agreements was reached and signed by Arthur which provided that Seymour, Samuel, and Irving's original salaries were reduced, effective immediately, to a nominal consulting salary. Arthur admitted that he agreed to the modification so his brothers would not lose their profit-sharing benefits. (Tr. 510, 531-32, 536.)

On the face of the profit-sharing plans, they could be amended at any time. Arthur, as the sole shareholder and president of Pielet Bros., signed the 1975 employment agreements permitting his brothers to engage in certain activities, *i.e.*, owning and operating a "scrap yard and shredder" 100 miles outside of Chicago. Our review of the record convinces us that there is substantial evidence to support the trial court's conclusion that to the extent language in the 1975 agreements governing competition is different from the 1967 profit-sharing plans, the later in time and more specific document controls.

Appellants vigorously assert that the attorney who prepared the 1975 employment agreements testified that he did not intend by those agreements to amend the profit-sharing plans. Semantically, one may question if it is an amendment to make specific what was previously only general. While this evidence unexplained might show the intention of the parties, its probative force is weakened by the fact that it shows counsel's understanding, not that of the parties. Counsel was called into a family conclave at short notice and without full briefing. He had previously represented all the brothers. Arthur knew he was not representing Arthur alone at that meeting. Furthermore, this evidence is far from being the only evidence on the question of intent, and as we have shown above, the lower court was well within its province to come to a conclusion contrary to that suggested by appellants. Even Arthur's testimony did not wholly support his litigation position. We are there-

fore not persuaded that the trial judge should be reversed on his determination that section 7 of the employment agreements governed the extent of competition allowed between the parties in this case.

II

Appellants' next argument is that the issue of the meaning of the words "scrap yard and shredder," as used in section 7 involved no issue of fact and should not have been submitted to the jury by special interrogatory. Expanding on that argument, they contend that where the terms of a contract are plain and unambiguous, such that the intention of the parties can be ascertained therefrom, there is no room for further inquiry.

Aside from whether we would consider the words "scrap yard and shredder" were ambiguous or involved questions of fact, appellants' argument cannot stand. Appellants expressly consented to the submission of the special interrogatory to the jury and should not now be heard to complain of its submission.

It appears that the subject of the special interrogatory first arose at the close of all the evidence when cross-motions for directed verdicts by the parties were presented. During argument, the court asked counsel for defendants-appellants, Mr. Topper, about the submission of a single interrogatory concerning the "right to buy and sell" scrap metal. (Tr. 670-71.) The following exchange took place:

> Mr. Topper: If it stood alone, the question with which we are—your Honor's question to me as to whether or not we went to the jury on that special interrogatory, would that be enough, and if they answered would the case be over—
>
> The Court: That is right. If they found—
>
> Mr. Topper: If they found that they could compete, that's the end of it.

* * * * *

But I would love to go to the jury on that issue your Honor has mentioned, I would love to, and if my client consents to it I'll go to the jury on that issue and consent to that special interrogatory.

The Court: Well, if you go to the issue—if you go to the issue on that and stand or fall on that, why—

Mr. Topper: I would, I would.

[Tr. 672-73.]

On the court's proposal of the submission of a single interrogatory, the counsel for both parties initially balked; apparently because they were concerned about waiving certain legal issues in the case. These issues included, on plaintiffs-appellees' side, the question of whether there was a proper forfeiture and whether forfeiture was permissible under ERISA; and on defendants-appellants' side, whether section 7 of the employment agreements had amended, hence governed, the amount of competition permitted by the noncompetition provisions of the profit-sharing plans. These facts are clearly discernible from the following exchange among the court, Mr. Topper, and Mr. Foote, plaintiffs-appellees' counsel:

Mr. Topper: Would you reserve after the jury returns and if the jury's verdict is that it is not prohibited, would you reserve consideration as matters of law whether or not, number one, there had been either an intention to change or modify or amend, and, secondly, whether under law that provision of Section 7 did actually effect an amendment or change of the original—those are two very important things—

The Court: Well, I mean, the whole point is—

Mr. Topper: And as I told your Honor in court—

The Court: Well, the questions of law remain in this case whether I separate it or not—

Mr. Topper: I understand, I understand.

* * * * *

Mr. Foote: Well, your Honor, I just have one question: Assuming that the jury comes in with this

bifurcated approach to liability and damages, assuming that the jury comes in and finds, then, my way, let's assume that they do, would your Honor then be inclined to enter judgment? That's the point. I mean that would certainly be an attraction to me if that is the game plan, that's what I am really trying to inquire as to, inquiring as to what your Honor has in mind.

Mr. Topper: Well, this is what I was inquiring about.

* * * * *

The Court: Well, let me say this, on the basis of the record as it stands I would stand on what, on the opinion that I have already issued, I mean, if there was a point of time some time ago where you wanted to tell me that you thought that I was wrong in reaching the conclusion that Section 7 governed—I still think Section 7 governs the employment—you can't just throw it out the window. So I guess the answer is that I would, so far as I am concerned, that would end the case—you are going to preserve your questions of law and if I am wrong on my construction, why, you have got that.

Mr. Topper: Well, fine. We have established it then. We certainly do. We have an understanding then.

The Court: So, I would enter it, yes.

Mr. Topper: You have got a real break now, Eddie [Edward Foote]. You can beat me openly, quickly and completely by just one little interrogatory.

[Tr. 730-32.]

A further discussion followed between counsel for both parties and the court in which language of the special interrogatory was agreed upon. (Tr. 742-46.)

Prior to closing arguments and instructions to the jury, the court again confirmed with counsel for both parties, at the request of defendants' counsel, that judgment would be entered based on the answer to the special interrogatory. The following discussion occurred:

Mr. Topper: Do we understand, or do I understand, if the Court please, that Mr. Foote has now agreed that the agreement that we have had, or had on Friday, shall be binding on both parties? The commitment that we made with the Court, the submission of that issue?

The Court: Well, I am not going to have you make a commitment unless he has a commitment with you, I mean, that's where it stands right now, right where it was on Friday.

Mr. Topper: I have said already—

The Court: I got a commitment, a commitment from counsel for you. You can't have it both ways. Either we have an agreement or we don't have one. Now, let's—

Mr. Foote: Are you addressing me, your Honor?

The Court: Yes.

Mr. Topper: Yes, he is.

The Court: I am.

Mr. Topper: For myself—I will answer, I have indicated to the Court that my answer is that we agree.

Mr. Foote: Well, your Honor, if the jury in response to this interrogatory answers it "No," meaning that they were not prohibited, do I understand then that that ends this entire case, other than your Honor entering judgment on the issues in the case?

The Court: That's what I said.

Mr. Foote: Let me talk to Mr. Wendrow.

(Whereupon Mr. Foote and Mr. Wendrow conferred.)

Mr. Foote: Very well, your Honor.

The Court: All right.

Mr. Foote: You have my agreement.

The Court: Well, I think that we have—I think that we have everything now agreed upon.

[Tr. 779-81.]

There can be no question on this record that defendants-appellants agreed to the submission of the

special interrogatory, the entry of judgment based on the answer, and the language of the special interrogatory.

In order to appeal a special interrogatory submitted to the jury under Rule 49(a) of the Federal Rules of Civil Procedure, or a refusal to submit a proposed interrogatory, a party must make a specific objection to the proposed interrogatory or to the trial judge's refusal to submit prior to the retiring of the jury. *Central Progressive Bank v. Fireman's Fund Insurance Co.*, 658 F.2d 377, 381 (5th Cir. 1981); *Hyde v. Land-of-Sky Regional Council*, 572 F.2d 988, 991 (4th Cir. 1978). As we have shown above, the appellants did not object but agreed to the interrogatory they now seek to challenge. Appellants have waived any right to raise an objection to the instant special interrogatory on appeal.

III

Appellants' final argument is that their claims for unfair competition were wholly separate from and unrelated to any of the issues resolved by the special interrogatory. Thus, they contend the district court erred, violating their constitutional right to a jury trial, in entering judgment for appellees on the unfair competition claim based on the jury's answer to the special interrogatory. Appellees respond that aside from expressly agreeing to the submission of the special interrogatory and the entry of judgment based on the jury answer thereto, defendants-appellants' counsel failed to demand a submission of the alleged issues of fact pertaining to the unfair competition counterclaim. This failure, appellees assert, is deemed, under Rule 49(a), a waiver of the right to a trial by jury. Rule 49(a) provides:

> The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings

> which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

In our view, appellants' argument falls within the provisions of Rule 49(a). As revealed in section II of this opinion, appellants agreed to the submission of the single special interrogatory. Nowhere in the record can we find, nor do appellants argue, that they objected to this procedure. Further, appellants did not even suggest to the trial court, prior to the time the special interrogatory was submitted, that issues of fact concerning their unfair competition counterclaim were not being addressed by the one interrogatory or that such issues should also be submitted by special interrogatory to the jury. The rule provides that on the submission of special interrogatories, if the trial court "omits any issue of fact raised by the pleadings or by the evidence" that each party waives the right to a jury trial of the omitted issue unless he demands its submission before the jury retires. Appellants' counterclaim for unfair competition and facts underlying same were obviously raised by the pleadings and by the evidence.

We think that this case is significantly similar in certain material respects to *Cote v. Estate of Butler*, 518 F.2d 157 (2d Cir. 1975). In *Cote*, the owner and the driver of a truck filed separate actions against the estate of a deceased motorist, alleging negligence of decedent;

an automobile dealer, alleging negligence and breach of warranty; and an automobile manufacturer, alleging breach of warranty. In each action the estate cross-claimed against the dealer and the manufacturer alleging negligence and breach of warranty. These cases were consolidated along with a third action, a description of which is not necessary for our purposes. The trial judge, after instructing the jury, submitted nine special interrogatories, five of which applied to the two actions we described. In these two cases, the decedent was found negligent and liable in damages to plaintiffs. Both defendants, the dealer, and manufacturer, were found not liable for breaches of warranty, and the dealer not liable for negligence to the two sets of plaintiffs. The trial judge entered judgment on the special interrogatories as they were returned. Thereafter, he ruled in favor of each cross-defendant and denied any recovery on any cross-claim asserted by the estate. The estate appealed contending that it should have been granted a new trial on the cross-claims because the special interrogatories, upon which judgment was entered for plaintiff, omitted questions relating to the cross-claims.

The Second Circuit ruled, inter alia, that "[a]s to the claimed erroneous omission from the special verdict questions of questions relating to the cross-claims, * * * any objections [appellants] may have been entitled to make were waived by its subsequent failure to bring exceptions to the omission to the attention of the trial judge." 518 F.2d at 160.

Here, appellants essentially claim that the special interrogatory omitted any issues dealing with its counterclaim of unfair competition, or alternatively, that no special interrogatory was submitted dealing with their counterclaim, and that the trial judge erred, after entering judgment in plaintiffs-appellees' favor, by dismissing their counterclaim. We are of the opinion that this case is sufficiently similar to the *Cote* case in the above-described material respects to warrant the same result on the Rule 49(a) question. We therefore reject

appellants' argument that they are entitled to a new jury trial on their unfair competition claim after having waived that right. In addition, the dismissal of the unfair competition claim was proper. Under Rule 49(a), the trial court is deemed to have found against defendants on factual issues not submitted to the jury.

In summary, we are unpersuaded that any reversible error was committed at the trial below, and we affirm, in all respects, the final judgment appealed from, entered in the district court on June 11, 1981. Judgment is hereby

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SEYMOUR PIELET, et al.,

Plaintiff-Counterdefendants

No. 76 C 4446 *vs.*

PIELET BROS. SCRAP IRON & METAL, INC., an Illinois corporation, et al.,

Defendant-Counterplaintiffs

FINAL JUDGMENT ORDER

This cause coming on to be heard on motion of plaintiffs for entry of judgment based on the jury's answer to the special interrogatory and on defendants' reply thereto and amendment to said reply, it is hereby ordered that final judgment be entered as follows:

1. Plaintiffs are awarded the amounts of $290,273.82 for Irving Pielet, $218,111.66 for Samuel Pielet, and $182,977.49 for Seymour Pielet, representing the balances of their individual accounts in the Pielet Bros. Scrap Iron & Metal Profit-Sharing Plan on April 20, 1981, plus interest at the rate at which the profit sharing funds are invested after April 20, 1981 until the date of payments by defendants to plaintiffs, subject, however, to the proportional deductions provided in paragraph 4 hereof and any deductions under paragraph 5.

2. Plaintiffs are awarded the amounts of $45,386.67 for Irving Pielet, $45,386.67 for Samuel Pielet, and

$40,930.87 for Seymour Pielet, representing the balances of their respective accounts in the Joliet Railway Equipment Employees' Profit-Sharing Plan on April 20, 1981, plus interest at the rate at which the profit-sharing funds are invested after April 20, 1981 until the date of payment by defendants to plaintiffs.

3. The counterclaim is dismissed without liability on the part of the counterdefendants.

4. Defendants are permitted to deduct further professional fees for legal work by Russell J. Topper in the amount of $41,363.70 from the entire value of the profit-sharing fund on April 20, 1981, against the amount of the individual account balances therein. Defendants are also permitted to deduct similarly the amount of $21,-033.00 representing advances by Pielet Bros. Scrap Iron & Metal and Joliet Railway for professional fees properly chargeable to the plans, on the same basis.

5. Plaintiffs are further awarded the amount of the cash value, dividends and interest, less loans, of the insurance policy Nos. 5101425 and 5124086 with Occidental Life of California on the lives of Seymour and Samuel Pielet. Defendants shall effectuate execution of such documents as are required to transfer ownership of these policies to a similar plan. Until such transfer is completed, defendants will continue the payment of premiums, as they are due, from the individual account balances of Seymour and Samuel Pielet and the amounts of such payments will be deducted from the amounts in paragraph 1.

6. Plaintiffs are jointly awarded statutory costs in the amount of $750.00, which costs are not to be charged against plaintiffs' account balances in either profit sharing plan.

7. Defendants' motion that judgment for plaintiffs be refused and judgment given them is denied; also, defendant's motion that fees be charged the plans for trustee services and for accountancy services in connection with

analysis of customer records in these proceedings is denied.

ENTER: /s/ BERNARD M. DECKER
U.S. District Judge

Dated at
Chicago, Illinois
this 11th day of June, 1981.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL ACTION FILE NO. 76C4446

SEYMOUR PIELET et al

vs.

PIELET BROS. SCRAP IRON & METAL et al

CIVIL ACTION FILE NO.
76C4446

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Bernard M. Decker, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its special verdict and judgment having been entered by the Court.

It is Ordered and Adjudged that Plaintiffs are awarded the amounts of $290,273.82 for Irving Pielet, $218,111.66 for Samuel Pielet, and $182,977.49 for Seymour Pielet, representing the balances of their individual accounts in the Pielet Bros. Scrap Iron & Metal Profit Sharing Plan on April 20, 1981, plus interest.

Plaintiffs are awarded the amounts of $45,386.67 for Irving Pielet, $45,386.57 for Samuel Pielet, and $40,-930.87 for Seymour Pielet representing the balances of their respective accounts in the Joliet Railway Equipment Employees' Profit Sharing Plan on April 20, 1981, plus interest.

The counterclaim is dismissed without liability on the part of the counterdefendants.

Defendants are permitted to deduct further professional fees for legal work by Russell J. Topper in the amount of $41,363.70 from the entire value of the profit-sharing fund on April 20, 1981 against the amount of the individual account balances therein. Defendants are also permitted to deduct similarly the amount of $21,-033.00 representing advances by Pielet Bros. Scrap Iron & Metal and Joliet Railway for professional fees.

Plaintiffs are jointly awarded statutory costs in the amount of $750.00.

Dated at Chicago, Illinois, this 11th day June, 1981.

H. STUART CUNNINGHAM
Clerk of Court

/s/ WM. E. KUHY, JR.,
Deputy

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

September 9, 1982

Before

Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. PHILIP NICHOLS, JR., Associate Judge*
Hon. RICHARD A. POSNER, Circuit Judge

SEYMOUR PIELET, IRVING PIELET, and SAMUEL PIELET,
Plaintiffs-Counterdefendants-Appellees,

No. 81-2117 *vs.*

ARTHUR PIELET, JAMES PIELET, and ROBERT PIELET, Individually and as Trustees of the PIELET BROS. Employees' Profit-Sharing Plan and JOLIET RAILWAY Employees' Profit-Sharing Plan, and PIELET BROS. SCRAP IRON & METAL, INC., and JOLIET RAILWAY EQUIPMENT CO.,
Defendants-Counterplaintiffs-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-C-4446—Bernard M. Decker, *Judge.*

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* The Honorable Philip Nichols, Jr., Associate Judge of the United States Court of Claims, is sitting by designation.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by defendants-counterclaimants, all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

RETIREMENT INCOME SECURITY 29 USCS § 1104

§ 1104. Fiduciary duties

(a) Prudent man standard of care. (1) Subject to sections 403(c) and (d) [29 USCS § 1103(c) and (d)], 4042 [29 USCS § 1342], and 4044 [29 USCS § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses,

unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3) [29 USCS § 1107(d)(3)]), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5) [29 USCS § 1107(d)(4) and (5)]).

(b) Indicia of ownership of assets outside jurisdiction of district courts. Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary. In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 404, 88 Stat. 877; Sept. 26, 1980, P. L. 96-364, Title III, § 309, 94 Stat. 1296.)

§ 1106. Prohibited transactions

(a) Transactions between plan and party in interest. Except as provided in section 408 [29 USCS § 1108]:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan, or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a) [29 USCS § 1107(a)].

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a) [29 USCS § 1107(a)].

(b) Transactions between plan and fiduciary. A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest. A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 406, 88 Stat. 879.)

APPENDIX E

SPECIAL INTERROGATORY

"In using the language 'employee shall not own, operate, or participate in the ownership or operation of a scrap yard or shredder,' in paragraph 7 of the employment agreements, did the parties intend to prohibit Seymour, Samuel, and Irving Pielet from buying and selling scrap metal within 100 miles of the City of Chicago?"

APPENDIX F

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SEYMOUR PIELET, SAMUEL PIELET, and IRVING PIELET,
Plaintiff-Counterdefendants,

No. 76 C 4446 *vs.*

ARTHUR PIELET, JAMES PIELET and ROBERT PIELET, individually and as Trustees of the Pielet Bros. Employees' Profit-Sharing Plan and Joliet Railway Equipment Employees' Profit-Sharing Plan, and PIELET BROS. SCRAP IRON & METAL, INC., and JOLIET RAILWAY EQUIPMENT CO.,
Defendant-Counterplaintiffs.

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

ARTHUR PIELET, JAMES PIELET, and ROBERT PIELET, individually and as Trustees of the Pielet Bros. Employees' Profit-Sharing Plan and the Joliet Railway Employees' Profit-Sharing Plan, and PIELET BROS. SCRAP IRON & METAL, INC., and JOLIET RAILWAY EQUIPMENT CO., defendant-counterplaintiffs, move the Court to set aside the verdict of the jury entered in the above entitled cause and the judgment entered thereon on June 11, 1981 and to enter judgment in favor of the defendants on the gounds, each involving issues of law, as stated hereunder, or, in the alternative to grant defendants a new trial.

This Honorable Court erred in the following respects:

1. In failing to sustain defendant-counterplaintiffs' motions at the close of plaintiff-counterdefendants' evidence, and at the close of all the evidence where, as here, the evidence is such that without weighing the credibility of the witnesses or considering the weight of the evidence, there can be only one conclusion as to the verdict that reasonable men could have reached: that controlling paragraph 9 of the owner-sellers' [SAMUEL, SEYMOUR, and IRVING] employment agreements of March 22, 1975 unequivocally forbade them to compete with PIELET BROS. SCRAP IRON & METAL, INC. and JOLIET RAILWAY EQUIPMENT CO. in metropolitan Chicago.

2. In failing to find and determine as a matter of law that even paragraph 7, as paragraph 9, of the owner-sellers' employment agreement was clear and unambiguous requiring no jury construction to discover its meaning.

3. In failing to find and determine as a matter of law that clear and unambiguous paragraph 7 forbade all scrap metal competition to owner-sellers, SEYMOUR, SAMUEL, and IRVING, in metropolitan because:

a) the trustees' construction of paragraph 7 barring such competition was conclusive and binding since the plaintiff-counterdefendants had in 1967 and 1969 authored, as trustees, and thereafter agreed, as plan beneficiaries, under Sections 15.01 and 13.01 of the PIELET and JOLIET plans, respectively, to be bound by the "construction adopted by the Trustees";

b) companion paragraph 9 of the employment agreement itself compels this conclusive finding binding SEYMOUR, SAMUEL, and IRVING to forego "performing services for any person, firm, or corporation engaged in a competing line of business";

"9. *Remedies for Breach.* In the event of the breach of any of the terms and conditions of this agreement to be performed by him (including, but not limited to, leaving Employer's employment or *performing services for any person, firm, or corporation engaged in a competing line of business with Employer without the written consent of Employer*) Employer shall be entitled, if it so elects, to institute and prosecute proceedings in any court of competent jurisdiction, either at law or in equity, to obtain damages for any breach of this agreement and to enjoin him from performing services for any such other person, firm, or corporation in violation of the terms of this agreement. *The remedies provided herein shall be cumulative and in addition to all other remedies which employer may have at law or in equity.*"

c) paragraph 7's opening sentence putting clearly one, among other, reasons for the total ban says:

"7. *Restrictive Covenant.* Both parties recognize that the services to be *rendered under this agreement* and the knowledge possessed and to be *acquired hereunder* by employee are special, unique, and of extraordinary character."

and was clearly meant to protect against *all* competitive misuses of such "special, unique, and extraordinary" knowledge acquired by "the services to be rendered under this agreement," services, as the employment agreement indicates, to include, without exception, all services performed by SEYMOUR, SAMUEL, and IRVING for PIELET BROS. and JOLIET before March 22, 1975;

d) the trial stipulation of facts—i.e., the written agreement of the parties themselves—also compels the finding that "scrap yard or shredder" operations for SEYMOUR, SAMUEL, and IRVING and ARTHUR PIELET—sophisticated business partners for almost forty years—meant one and only one thing: that all scrap metal business operations were forbidden, including brokeraging or buying and selling scrap metal without processing;

Stipulation of Fact No. 2 reads:

"2. Since its incorporation in January, 1955, Pielet Scrap operated scrap yards, including an automobile shredder, in the greater Chicago Metropolitan area [McCook and Summit, Illinois]. It was there that it engaged in the business of buying and selling scrap metal and buying scrap metal for processing and sale to the mills, foundries, smelters, and refineries, and *brokers*."

"The scrap metal included railroad cars, automobiles, industrial and structural and regular miscellaneous scrap which were processed into an end product for resmelting by the mills, smelters, foundries, and refineries. The processed automobiles produced byproducts such as residue, rubber, aluminum, and zinc. *The companies also engaged in the buying and selling or brokeraging of scrap metals and residue.*"

and

Stipulation of Facts No. 5 reads:

"5. Joliet operated a 'scrap yard' at Joliet, Illinois. It was there that Joliet purchased old railroad cars and locomotives and processed them into salable scrap *or sold them before or after delivery.*"

e) PIELET'S Articles of Incorporation describing its purposes and powers also defines "scrap yard" to include brokeraging or buying and selling of scrap before or after delivery.

f) The absurdity of a construction of paragraph 7 that forbids "scrap yard" operations and allowing brokeraging, buying and selling at one and the same time, becomes apparent when the simplest method for establishing their right to brokerage was ignored by SEYMOUR, SAMUEL, and IRVING and their expert attorney and adviser, Herbert Olfson. All they had to do was say:

> "Sam, Seymour, and Irving shall have the right to brokerage or to buy and sell scrap metal, before and after delivery, in metropolitan Chicago."

g) The absurdity of a construction of "scrap yard" that would, in an open invitation to disaster, permit sophisticated sellers, SEYMOUR, SAMUEL, and IRVING, after being paid $10,000,000 in cash, to buy and sell scrap metal right in the middle of the industrial home of PIELET and JOLIET where, for almost forty years, the sellers had bought and sold scrap.

h) The absurdity of a construction of "scrap yard" that would allow scrap "buying and selling" in greater Chicago where, as plaintiffs' testimony itself reveals, an indispensable part of the "scrap yard" business consists of "buying and selling scrap metal," without which the scrap yard could not exist.

4. In failing to find and determine as a matter of law that paragraph 9 of the 1975 owner-sellers' employment agreement with PIELET and JOLIET governed the rights and duties of the parties with regard to competition and that the plain and unambiguous terms of said paragraph 9 unconditionally

prohibited SEYMOUR, SAMUEL, and IRVING from "engaging in a competing or similar line of business."

5. In failing to find and determine as a matter of law that the 1975 employment contract, as it concerned the matter of the sellers' employment by PIELET and JOLIET and the continuation of said sellers' profit-sharing interests, was an unperformed and illegal and fraudulent sham; that it was exclusively designed by said sellers as fiduciary-plan trustees to steal a march on the remaining plan beneficiaries by first acquiring a right to compete not granted other plan beneficiaries, then to compete without forfeiting their benefits as other beneficiaries would, and, without working, to misappropriate two added years of benefits to the injury of the remaining beneficiaries.

6. In failing to find and determine as a matter of law that the jury verdict found only that paragraph 7 did not prohibit sellers, SEYMOUR, SAMUEL, and IRVING, from limitedly competing in the Chicago area—nothing more; and in failing to find as a matter of law that, even granted the correctness of such construction, paragraph 7(i) did not amend, as it must, the prior 1967 and 1969 profit-sharing agreements; and (ii) did not amend, as it must, said agreements to revoke and abolish its "no compete" provision as it applied to sellers, SEYMOUR, SAMUEL, and IRVING alone.

7. In failing to find and determine as a matter of law that the 1967 and 1969 PIELET and JOLIET profit-sharing agreements alone govern the benefit rights of sellers, SEYMOUR, SAMUEL, and IRVING, and that they [the agreements] forbade application of those trust funds to the payment of their [SEYMOUR, SAMUEL, and IRVING'S] benefits because:

a) there never was an intention to amend or change the profit-sharing agreements; paragraph 7 was not intended to amend or change

such agreements as legal expert, drafter, and explainer, Herbert Olfson, sellers' attorney, testified at trial on cross-examination;

b) not only was there no intention that paragraph 7 amend, as plaintiffs admit, there was no intention, therefore, to amend and abolish, as it must, the provisions of the agreements forbidding plan beneficiaries from "competing with PIELET and JOLIET in the same line of business";

c) paragraph 7 was neither treated nor constructed as an amendment to the 1967 and 1969 plan agreements in that said paragraph 7 was not designated or described, nor separately prepared and drafted as an amendment as all eight previous amendments had been designated, described, and separately drawn;

d) paragraph 7 was not signed or executed as a plan amendment by the trustees and the company as all eight previous amendments had been executed;

e) even if separately constructed and executed as an intended amendment to revoke and abolish "no compete" forfeitures as to SEYMOUR, SAMUEL, and IRVING, paragraph 7 nevertheless must fail as an amendment since the 1967 and 1969 plan agreements themselves forbade amendments such as paragraph 7 that created:

> "any legal or equitable right *against* any employer or trustees' (right to compete; right to compete free of benefit forfeiture. Ed.) (Sections 13.03 Pielet; 15.03 Joliet.)

f) even if separately constructed and executed as an intended amendment, paragraph 7 must nevertheless fail as such amendment since its construction by the trustees forbidding all competition is binding upon SEYMOUR, SAMUEL, and IRVING under Section 15.01 and Section

13.01 of the PIELET and JOLIET plans, respectively;

g) even if separately constructed and executed as an intended amendment investing the sellers with the right to compete and revoking and abolishing the "no compete" forfeiture of the plan agreements to permit sellers' freedom to compete without benefit loss, paragraph 7 must fail as such amendment since it grants valuable and protected rights of competition to plan trustee-fiduciaries, SEYMOUR, SAMUEL, and IRVING, contrary to Employment Retirement Income Security Act (29 U.S.C., 1104(a)(1), 1105(a)(b)(1), and 1106(b)(1)(2)(3);

h) paragraph 7 must fail as a revocatory amendment since it unlawfully discriminates against the remaining hundreds of beneficaries by conferring upon sellers, SEYMOUR, SAMUEL, and IRVING, while plan trustees and fiduciaries, preferential rights to compete, benefit risk-free, rights not given the remaining plan beneficiaries;

i) paragraph 7 must fail as a revocatory amendment since it unlawfully discriminates against the remaining beneficiaries by granting sellers, SAMUEL, SEYMOUR, and IRVING, competitive rights against the contributing PIELET and JOLIET companies reasonably certain to reduce the amount of their profit contributions to the plans.

8. In failing to find as a matter of law and to allow as a matter of fact, counterclaimants to proceed to a full trial before Court and jury upon the counterclaim issues involving counterclaimants' claims that SEYMOUR, SAMUEL, and IRVING competed with PIELET and JOLIET for five years contrary to the "no compete" provisions of paragraphs 9 and 7 of the employment agreements, unlawfully

appropriated the trade name of "Pielet Bros.," and unfairly competed for all of the period immediately following the sale of March 22, 1975.

9. In admitting the testimony of SEYMOUR, SAMUEL, and IRVING and Olfson, their attorney, to contradict the clear and unambiguous language of paragraphs 9 and 7 of the 1975 employment agreements contrary to the substantive parol evidence rule. Substantial rights of the defendant-counterclaimants were affected by this erroneous action.

10. Substantial rights of the defendant-counterclaimants were prejudiced by counsel for the plaintiffs by his persistent appeal to the false representation that if the plaintiffs were refused profit-sharing benefits, that the defendant, ARTHUR PIELET, would get them, and by his frequent statements and proof and in his summation, appeals, statements and proof that were designed to improperly appeal to the sympathy and prejudice of the jury.

11. In failing to find and determine that the verdict of the jury was without any substantial evidence to support it.

12. In failing to find and determine that the verdict of the jury was contrary to the manifest weight of the evidence.

13. In failing to find and determine, upon motions of the defendant-counterclaimants at the close of the evidence of the plaintiff-counterdefendants and all evidence, that there was no genuine issue of material fact or facts for the jury to determine and that the jury should return a verdict for the defendant-counterclaimants.

For the aforesaid reasons, ARTHUR PIELET, JAMES PIELET, and ROBERT PIELET, individually and as Trustees for the PIELET BROS. Employees' Profit-Sharing plan and JOLIET RAILWAY Employees' Profit-Sharing Plan, and PIELET BROS. SCRAP IRON & METAL, INC. and

JOLIET RAILWAY EQUIPMENT CO., defendant-counterclaimants, move the entry of an order:

(1) setting aside the verdict of the jury and the final judgment order of the Court entered June 11, 1981;

(2) entering a judgment, notwithstanding the verdict, for PIELET BROS. SCRAP IRON & METAL, INC., and JOLIET RAILWAY EQUIPMENT CO. and ARTHUR PIELET, JAMES PIELET, and ROBERT PIELET as trustee-defendants, and against plaintiffs, and dismissing their amended complaint with prejudice;

(3) directing the cause to proceed to trial before a jury upon the counterclaim; or, in the alternative,

(4) directing a new trial to be had of the entire cause.

ARTHUR PIELET, JAMES PIELET and ROBERT PIELET, individually and as Trustees of the PIELET BROS. Employees' Profit-Sharing Plan and JOLIET RAILWAY Employees' Profit-Sharing Plan, and PIELET BROS. SCRAP IRON & METAL, INC., and JOLIET RAILWAY EQUIPMENT CO.

By /s/ RUSSELL J. TOPPER,
their attorney

Russell J. Topper
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June 22, 1981

APPENDIX G

"Section 8—Terminated Employee

"8.01. Any participant who becomes a Terminated Employee shall be entitled to receive the entire amount of his account attributable to his Employee Contributions, and, unless he has been discharged for 'cause,' as hereinafter defined, he shall be entitled to receive that portion (sometimes referred to herein as the 'vested interest') of the amount of his account attributable to Employer Contributions as is shown by the following table:

If the Number of His Full Consecutive Plan Years of Participation Is:	The Portion of the Amount of his Account Shall Be:
1	10%
2	20%
3	30%
4	40%
5	50%
6	60%
7	70%
8	80%
9	90%
10 or more	100%

"For purposes of the foregoing table, a Participant shall be credited with a full Plan Year of Participation for the Plan Year in which he became a Participant; a Plan Year of Participation shall be counted even though no Employer Contribution is made for such Year.

"8.02 Discharge for 'cause' shall mean discharge for theft or embezzlement of property of an Employer, for conviction of a crime resulting in injury to the property or business of an Employer, or for actively engaging in or working for a business in direct competition with an Employer while employed by an Employer. A Partici-

pant discharged for 'cause' shall not be entitled to any portion of the amount of his account attributable to Employer Contributions.

"13.01. No part of the Fund shall ever revert to any Employer or be used for, or diverted to, purposes other than for the exclusive benefit of the Participants or their Beneficiaries, and the expenses of the Plan. No person shall have any interest or any right to the Fund or any part thereof except as expressly provided in the Plan."

JOLIET RAILWAY PROFIT-SHARING FORFEITURE PROVISION

"Section 8—Terminated Employees

"8.01 Any Participant who becomes a Terminated Employee shall be entitled to receive the entire amount of his Account Balance attributable to his Employer Contributions, and, unless he commits or has committed a 'prohibited act' (as hereinafter defined), he shall be entitled to receive that portion (sometimes referred to herein as the 'vested interest') of his Account Balance attributable to Employer Contributions as is shown by the following table:

If the Number of his Full Consecutive Plan Years of Participation Is:	The Portion of the Amount Of His Account Balance Shall Be:
1	10%
2	20%
3	30%
4	40%
5	50%
6	60%
7	70%
8	80%
9	90%
10 or more	100%

"For purposes of the foregoing table, a Participant shall be credited with a full Plan Year of Participation for the Plan Year in which he becomes a Participant. A Plan Year of Participation shall be counted even though no Employer Contribution is made for such Year.

* * *

"10.04 For purposes of the Plan, a 'prohibited act' shall mean any of the following: (a) theft or embezzlement at any time of money or property of an Employer; (b) commission of a crime at any time which results in injury to the property or business of an Employer; (c) violation at any time of any of the substantive terms of an employment contract with an Employer; (d) engaging in activity, while in the employ of an Employer, which competes with any activity of an Employer; (e) disclosing, while in the employ of an Employer, secret or confidential information of such Employer without the permission of such Employer; or (f) disclosing, while not in the employ of an Employer, secret or confidential information of an Employer without the permission of such Employer, if there is a judicial determination (a determination by a court of competent jurisdiction which has become final by reason of the unavailability of any further appeal therefrom or the expiration of the time for filing any further appeal therefrom) that such a disclosure has occurred.

"*Section 15—Miscellany*

"15.01 No part of the Fund shall ever revert to any Employer or be used for, or diverted to, purposes other than for the exclusive benefit of the Participants or their Beneficiaries, and the expenses of the Plan. No person shall have any interest in or any claim upon the Fund or any part thereof except as expressly provided in the Plan. The Trustees shall not loan any part of the Fund to any Participants."

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No. 82-823

In the

Supreme Court of the United States

OCTOBER TERM, 1982

ARTHUR PIELET, JAMES PIELET, and ROBERT PIELET, Individually and as Trustees of the PIELET BROS. Employees' Profit-Sharing Plan and JOLIET RAILWAY Employees' Profit-Sharing Plan, and PIELET BROS. SCRAP IRON & METAL, INC., and JOLIET RAILWAY EQUIPMENT CO.,

Petitioners,

vs.

SEYMOUR PIELET, IRVING PIELET, and SAMUEL PIELET,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-823

ARTHUR PIELET, JAMES PIELET, and ROBERT PIELET, Individually and as Trustees of the PIELET BROS. Employees' Profit-Sharing Plan and JOLIET RAILWAY Employees' Profit-Sharing Plan, and PIELET BROS. SCRAP IRON & METAL, INC., and JOLIET RAILWAY EQUIPMENT CO.,

Petitioners,

vs.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REASONS FOR DENYING THE PETITION

The Petition fails to show why this diversity case, concerning only proper construction of a limited, *sui generis* Illinois contract not to compete, is worthy of *certiorari*. The case is a run of the mill "family fight."

No federal question is presented.

The question presented by the petition is important only to the litigants; no showing is made that the decision of the Court of Appeals conflicts with any decision of the Illinois Supreme Court or an Illinois Appellate Court. As shown below, the decision is entirely in accord with the decisions of the Illinois courts of review; and, certainly, it presents no question of public importance. This Court does not sit as a super court of appeals to review anew all questions of state law determined by the twelve courts of appeal. "[Certiorari] jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing" (*Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163), "or for the benefit of the particular litigants" (*Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74), but to decide issues, "the settlement of which is of importance to the public as distinguished from that of the parties" (*Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393).

The district court ruled that the degree of permitted competition between the Pielet brothers was governed by the terms of limited noncompete covenants contained in employment agreements and not by the terms of an earlier profit-sharing agreement. The logic was that the later employment agreements controlled since all the brothers (all of the stockholders), were parties to both agreements. Since the district court felt the meaning of the covenants was ambiguous and required resort to extrinsic evidence, the case was submitted to a jury on a special interrogatory as to the breadth of the noncompete clause.

The parties agreed upon this procedure in the district court as recognized by the Seventh Circuit:

> After extensive consultation with counsel for both sides, the district court submitted a single special interrogatory to the jury concerning the meaning of section 7 of the employment agreements. *Both sides agreed to the procedure and upon the language of the special interrogatory which read*:
>
> > In using the language 'employee shall not own, operate, or participate in the ownership or operation of a scrap yard or shredder,' in paragraph 7 of the employment agreements, did the parties intend to prohibit Seymour, Samuel, and Irving Pielet from buying and selling scrap metal within 100 miles of the City of Chicago?
>
> The judge plainly thought that an answer to this one question furnished the key to the entire case. The jury answered the interrogatory 'no' and the court entered judgment for the plaintiffs and against Arthur and the other defendants.

Op. 7th Cir., Petitioners' App. at 6a; Emphasis supplied. The Seventh Circuit further stated:

> There can be no question on this record that defendants-appellants agreed to the submission of the special interrogatory, the entry of judgment based on the answer, and the language of the special interrogatory.

Op., 7th Cir., Petitioners' App. at 13a. The cases are uniform under Rule 49(a) of the Federal Rules of Civil Procedure that a party must object to a special interrogatory if he wishes to complain of it on appeal. Petitioners refer to no conflict between circuits on this score because there is none.

The Seventh Circuit further held that the ERISA and other issues in the case were "mooted" by the consent to the special interrogatory procedure and under the express language of Rule 49(a). *Id.*, Petitioners' App. at 7a.

Respondents suggest that the Petition for a Writ of Certiorari is little short of frivolous.

Respectfully submitted,

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